UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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KAREN WEGMANN

Plaintiff

v. 15 CV 3815 (KPF)
Oral Argument

YOUNG ADULT INSTITUTE, INC., TRUSTEES OF THE SUPPLEMENTAL PENSION PLAN FOR CERTAIN MANAGEMENT EMPLOYEES OF YOUNG ADULT INSTITUTE

Defendants

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New York, N.Y.
April 14, 2016
4:00 p.m.

Before:

HON. KATHERINE POLK FAILLA

District Judge

APPEARANCES

ZABELL & ASSOCIATES
Attorney for Plaintiff
SAUL D. ZABELL

GROOM LAW GROUP, CHARTERED
Attorneys for Defendants
NATASHA S. FEDDER
MICHAEL J. PRAME

(In open court; case called)

THE DEPUTY CLERK: Counsel, please identify yourselves for the record beginning with plaintiff.

MR. ZABELL: For the plaintiff, Saul Zabell from the law firm of Zabell & Associates. Good afternoon, Judge.

THE COURT: Good afternoon.

MS. FEDDER: For the defendants Natasha Fedder and Michael Prame of the Groom Law Group, Chartered. Good afternoon, your Honor.

THE COURT: Good afternoon. Ms. Fedder, will you be taking the laboring lead?

MS. FEDDER: Yes, I will.

THE COURT: I will direct my questions to you then. Thank you very much.

Mr. Zabell, let me speak first with you, sir. In my last communication, it was my opinion to the parties with respect to the motion to dismiss, and I suggested that if you wished to amend, you could. So you have now filed a proposed amended complaint. Is that correct, sir?

MR. ZABELL: I have, and I have filed that one day late.

THE COURT: Yes.

MR. ZABELL: And it was brought up by my adversary.

THE COURT: Yes. Why don't we talk about that. Why? Could it not have been filed on time, sir?

MR. ZABELL: It absolutely could have and was completed the day before. I can't even call it law office failure. It's my fault, your Honor. I misdiaried the date. I don't know why I diaried the date as I did. All I could think of is that I looked at your order and counted days from that order as opposed to including that order. I apologize. I apologize to my adversary. It has instilled in me a feeling of inadequacy that I have not had since I was a newly admitted attorney.

THE COURT: OK. Well, I don't know -- we are not going to lay out a couch anywhere for you, sir. So that is fine. I did want to hear what had happened.

MR. ZABELL: That's why when I submitted it, I did not even realize it was late. It wasn't until my adversary brought it to the Court's attention in their letter, that's when I immediately wrote the letter I did asking for an opportunity to respond or be heard.

THE COURT: Thank you very much.

Let me talk to Ms. Fedder then. Thank you.

Ms. Fedder, I am aware that what I meant to do and what I did in the opinion is not to commit necessarily to accepting the proposed amended complaint because what I was trying to do, just so everyone is aware, is I am trying to forestall another round of motion practice.

So I have thought about, and I will continue to think

about, the arguments you've made, but can we talk first, please, about the discrimination claims, the gender discrimination claims under state, federal and city laws.

I am understanding your argument to be that there just isn't enough to show similar situation. Is that correct?

MS. FEDDER: Yes, your Honor, that's correct.

THE COURT: Let me ask you a couple of foundational questions: Ms. Wegmann only has to show similar situation with one person, correct, one male in this case. Would you agree?

MS. FEDDER: At this stage, yes, your Honor.

THE COURT: Would you agree with me also that the one she comes closest to or the one she tries to align herself most closely with is Mr. Rut?

MS. FEDDER: I would agree with you there, your Honor.

THE COURT: One might argue -- I think it's been argued -- that she believes that she followed the same career path or career trajectory that he had. Why is that not sufficient? Can you tell me why she's not similarly situated to him?

MS. FEDDER: Yes. Thank you, your Honor.

THE COURT: Sure.

MS. FEDDER: Although Ms. Wegmann has alleged, as you've stated, she still has not alleged when Mr. Rut became a participant in the plan or what his title, duties or tenure were at that time.

Briefly, your Honor, when he and the other five males became participants in the SERP and their titles and duties at that time is material. The SERP was adopted in 1985 for certain management employees. When it was adopted, only Joel Levy, the executive director, and Phillip Levy, the associate executive director, were participants.

In 1993, the board approved the addition of four more participants to the plan: Three men and one woman. The three men were Joseph Rut, Stephen Freeman and Thomas Dern, and their titles at the time when they entered the plan were, respectively: CFO, assistant executive director, and assistant executive director.

THE COURT: I'm sorry the second and third one again, please.

MS. FEDDER: It's Joseph Rut.

THE COURT: One was CFO. One was --

MS. FEDDER: Stephen Freeman was the assistant executive director.

THE COURT: OK.

MS. FEDDER: And Thomas Dern held the same title. He was also assistant executive director.

THE COURT: Thank you.

MS. FEDDER: You're welcome.

After that time, the board did not add anyone else to the plan. The board limited participation in the SERP in

response to certain changes in the tax laws that had adverse tax consequences for top hat plans like the SERP, and that included grandfatherings.

For example, your Honor, Congress enacted a statue in 1996: 26 U.S.C. Section 4958, which included a grandfather rule. Under that rule, binding contracts that were in existence as of September 13, 1995, and that were not materially changed as of that date, were permitted to operate under the old, more favorable law. And, accordingly, no one was added to the SERP after 1995.

THE COURT: Let me stop you, please.

MS. FEDDER: Yes.

THE COURT: So, if Ms. Wegmann is analogizing herself to Mr. Rut, is it your argument that she would have to allege, either because she knows or on information and belief that she was CFO at a particular time period or is it enough -- was she ever an assistant executive director?

MS. FEDDER: No.

THE COURT: No, that was not her position. So, what you're saying is the absence of reference to Mr. Rut's title is significant because it was by dint of his title of CFO that he was included in this plan.

MS. FEDDER: Yes, the absence of his title at the time he became a participant is significant.

THE COURT: OK.

MS. FEDDER: And also the absence of an allegation as to the time when he became a participant is significant because, as I've stated, no one was put into the plan after 1995 and in response to these changes in the tax laws.

So, in the absence of such allegations that Ms. Wegmann was similarly situated to Mr. Rut in terms of his title, duty and tenure at the time he was put into the plan, her allegation is really just that he is a man and he is in the plan and that's not enough for her discrimination claims.

THE COURT: I think what she is saying is, he is a man behind whom I followed very closely, and substantively, our roles and our responsibilities in the company were indistinct. So if he gets in, I should get in.

Could you remind me again. Mr. Rut was placed in the plan in 1993. When did the defendant make the determination not to include anyone else? Was that shortly thereafter?

MS. FEDDER: Your Honor, it would have been in 1996.

THE COURT: 1996. OK.

MS. FEDDER: Following the passage -- and I would say I would need to confirm with my client, but at this point my belief is that it was in 1996, shortly after the passage of the tax law that included the grandfather rule that I described. That was the reason why no one was added to the plan after 1995.

THE COURT: Just playing devil's advocate for a

moment, I understand what you are saying in the context of, for example, a summary judgment motion.

MS. FEDDER: Absolutely.

THE COURT: Where what you say to me is, even assuming a prima facie case is made, we have a non-gender based reason for her non-inclusion in the program, and she cannot prove pretext in that regard, right? So I know the summary judgment motion you're going to make some day if we get that far. But I'm just wondering how I get to do all of this on a motion to dismiss because what she is saying is, I need to allege similarity, and I am telling you I am similar to this gentleman who is a member of the plan because I held these roles, and I had these responsibilities, and they are, again, substantively and distinct to what he did.

So I am just wondering in this context why that fails. Why when I'm analyzing, if you will, with a 12(b)(6) lens, why these allegations fail.

MS. FEDDER: Yes, your Honor. I appreciate your question. I would offer a few points in response.

First, as Ms. Wegmann alleges in her complaint, she was the CFO of the company in 2006; and in that position, we know it to be the case that she was familiar with the SERP, and thus, we believe that she could include allegations regarding when these male participants were put into the plan and what their titles and duties were at that time if those allegations

were helpful to her.

Second, your Honor, I certainly appreciate the procedural posture of the case, and we appreciate your listening to us preview for you what our position would be at a later stage.

THE COURT: OK. May I turn then to the ERISA claim, please.

MS. FEDDER: Absolutely.

THE COURT: So there I'm understanding your -- let's call it your futility argument because basically what you're saying is, these amendments don't help. They make the claims no more viable than they were at the time I was analyzing them in the context of the motion to dismiss.

So with respect to the ERISA claim, I'm understanding your principal argument to be exhaustion or failure to exhaust. Am I correct?

MS. FEDDER: Yes, your Honor.

THE COURT: What Ms. Wegmann says back to me is, she was not made aware of certain things. She was not given the information that she needed to be given. She never received the written notice and, therefore, cannot be faulted for failure to exhaust.

Now, you know, and your adversary knows, and I know, and in fact the Second Circuit issued a decision two days ago on the point, that failure to comply with the sort of

claims-handling procedure can vitiate the need or basically can constitute exhaustion. So she's saying I didn't even know about it, so I didn't know to exhaust.

Why should I disregard that in this setting?

MS. FEDDER: Your Honor, the Second Circuit in the case *Davenport v. Harry N. Abrams, Inc.*, which I believe the Court cited in its opinion, but for everyone's convenience, the case cite is 249 F. 3d 130. In that case, the Second Circuit agreed with the district court and said: Even if plaintiff was unaware of her remedies under the plan prior to the institution of this action, she became aware of them now, and yet has inexcusably failed to avail herself of them. Davenport, the plaintiff, was required to exhaust even if she was ignorant of the proper claims procedure.

The page where that language is found is 134. So under the Second Circuit's ruling in this case, it is not enough that Ms. Wegmann was not aware of her rights under the plan.

THE COURT: I understand the argument better. I reserve the right to come back to you, but I want to talk to Mr. Zabell first. Thank you.

MS. FEDDER: Thank you, your Honor.

THE COURT: Mr. Zabell, let's talk about the discrimination claims and the similar situation.

MR. ZABELL: Sure. I think what I'm most troubled by

is counsel identified three men that were let into the plan and she alluded to a woman that was allowed in the plan as well.

THE COURT: Yes.

MR. ZABELL: We allege in the red line version of -- we allege in our proposed amended complaint that at some point a female secretary prior to 2007, a secretary was allowed in the plan.

THE COURT: OK.

MR. ZABELL: That we believe undercuts the argument that my client's position as assistant controller all the way up is a management level position, and we certainly allege throughout the complaint that she was advised that she was a management level employee. She was treated as a management level employee. She was given management level employee benefits other than the SERP. That's one issue.

She did follow the trajectory of Rut. And Rut was, according to what counsel was saying, Rut was in the position of CFO for a year or two before, as counsel says, he was eligible. My client was in the CFO position for two years, '06 and '07, before the plan was changed.

THE COURT: Tell me, please, when the plan was changed.

MR. ZABELL: It was changed effective July of 2007.

THE COURT: OK.

MR. ZABELL: And I believe it was changed December of

'06 to be effective that July of '07.

THE COURT: Did I mishear your adversary speaking earlier about 1996 as the time period when certain tax changes went into effect?

MR. ZABELL: I believe that counsel references certain tax changes and certain eligibility, but the eligibility in the plan document which governs the plan was not changed until 2007, effective 2007. So when I say 2007, I only mean effective 2007.

THE COURT: All right.

MR. ZABELL: So that plan eligibility only says each management employee with 15 years of service with the institute whose compensation is not fully considered in the computation of federal social security benefits --

THE COURT: Slow down. Thank you, counsel.

MR. ZABELL: Sorry. I know when I read, I speed up. Sorry.

-- shall be eligible to participate in the plan.

That's the only plan requirements. It's not a matter of the board wanting to put somebody in the plan. The board adopted the language of the plan document. So whether or not the board wants to honor the language of the plan document, their only avenue is to change the plan document, because once they adopt the plan, they're stuck by its terms until it's amended. And, in essence, what they did was they created a

plan that by virtue of my client's years of service and her management level, which, OK, I understand it's a disputed issue, but it's a disputed issue that relies on facts that we need to develop, and I'm fairly confident we'll be able to develop, and I think in the amended complaint we were able to outline exactly why my client believed that her position all along from the date of hire was a management level position.

So, if all that is required is 15 years as a management level employee and your admission into the plan is automatic, then counsel's reference to the board putting people in is moot. It's really misdirection. OK, once they amend the plan effective July of 2007, they've changed the plan. At that point my client had already been in the plan for over six years.

THE COURT: Or so she thought.

MR. ZABELL: Or so she thought.

THE COURT: Yes.

MR. ZABELL: Now, in addition, in the proposed amended complaint, we have allegations that she was told by the chairman of the board, the person who was responsible for signing off on the amendments to the plan, that she was mistreated; she should have been in the plan. And that if she stayed with the organization, that he would remedy that.

THE COURT: But how does that get you a gender discrimination claim.

MR. ZABELL: That's our smoking gun. That's an admission of discrimination.

THE COURT: What's the totality of what this individual said to her?

MR. ZABELL: The totality as I believe --

THE COURT: Yes, tell me the paragraph number.

MR. ZABELL: I want to say paragraph 76. I'm sorry, paragraph 77.

THE COURT: He advised her that she -- because your statement to me a few moments ago did not include the gender part. It says, she was not treated equivalently to male executives. That is exactly what he said or in substance that's what he said?

MR. ZABELL: That's what she relayed to me, yes.

THE COURT: Ms. Fedder, I promise I'll let you talk momentarily. I see you standing.

MS. FEDDER: I'm sorry. I was standing up to get a better view of my binder.

THE COURT: Fine.

Mr. Zabell, keep talking.

MR. ZABELL: Sure. To address counsel's argument that as CFO she should have known that there was an amendment and that's when her time to complain about that amendment ran, factually, that is not the information that my client had. My client was not provided a copy of the amended plan until after

her employment ended.

THE COURT: But she was CFO, correct?

MR. ZABELL: Yes.

THE COURT: How did she not know?

MR. ZABELL: Because as CFO, as she relayed to me, her responsibilities had more to do with the financial planning, not the financial administration of the business. So she was arranging for loans, she was making sure that creditors were paid, she was overseeing certain departments. She was not handling the SERP, which was handled solely by the board. And in the plan language, it talks about the board being responsible.

Now, there is yet another issue, the exhaustion.

THE COURT: Yes.

MR. ZABELL: It seems to me, Judge, that the language that you cited from the Second Circuit's recent decision is applicable here, but it is applicable to show that YAI did not comply with their obligations to notify my client that she wasn't eligible for the plan properly. That, according to the plan 2007 amendment, talks about futility. It talks about the review process and if, YAI does not reject her application or her request for benefits in writing notifying her of her rights, then they've waived their argument to claim that.

"Except for claims requiring an independent determination of a participant's disability status, her request

for a review of a denied claim must be made in writing." I'm sorry, I'm reading the wrong paragraph.

THE COURT: OK.

MR. ZABELL: Manner and content of denial of initial claims.

If the administrator denies a claim, it must provide to the claimant in writing or by electronic communication the specific reasons for the denial, a reference to the plan provision upon which the denial is based, and a whole host of other obligations, including a statement of the claimant's right to bring a civil action under ERISA as amended, and I paraphrase the language there.

And it says that: Failure of the plan to follow procedures -- it's its own caption. If the plan fails to follow the claims procedures required by this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedy under ERISA Sections 502(a) on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

That is futility.

THE COURT: So, you're saying irrespective of how the courts have interpreted the failure to comply with one's own claims processing procedures, the fact that there is a

provision in the agreement that obviates the need for option is what controls here?

MR. ZABELL: I think their plan gives the Second Circuit a pat on the back and says, "You got it right."

THE COURT: Oh, OK.

MR. ZABELL: I'm making light of it, but their own plan says exactly what you quoted from the Second Circuit.

THE COURT: In the absence of that Second Circuit decision, would this still control? She would not need to exhaust because of that provision?

MR. ZABELL: This says that she did exhaust.

THE COURT: I see. That's the argument.

MR. ZABELL: Right.

THE COURT: OK.

MR. ZABELL: It says she did exhaust because, in essence, it would have been futile to proceed because the plan didn't comply with their obligations; not that they said futile, but they talk about the same standard -- the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim, which is the essence of futility.

THE COURT: Anything else, sir?

MR. ZABELL: No.

THE COURT: Ms. Fedder, something in reply?

MS. FEDDER: Your Honor, would you like me to kind of

freestyle a response or is there a point you would like me to begin with?

THE COURT: Let's go with free-styling. I don't have specific questions for you. I've heard your arguments. I've heard Mr. Sable's responses. And before I step off the bench and think about what you both have said, I wanted to give you a final word.

MS. FEDDER: Thank you, your Honor. I appreciate that.

First, with respect to our similarly situated allegations, I appreciate the points Mr. Zabell has made about plaintiff's eligibility, but what is at issue here is whether this amended complaint had cured the deficiencies that the Court identified in its opinion and order.

While, of course, we do not concede that the plaintiff was a participant in the plan or was entitled to benefits under the plan, we certainly respect the Court's determination that at this stage she has pleaded sufficient allegations with respect to her participation in the plan. So we don't think that that is an issue here.

With respect to similarly situated, the point we're making is one of timing; that it is a critical point that no one was put into the plan after 1995, and that one of the aspects of that timing is that the change in these tax laws puts Ms. Wegmann in a circumstance that is different from

Mr. Rut.

In other words, Mr. Rut was put into the plan. There was an intervening change in the tax laws. No one was put into the plan after that time. And she has failed to put forth allegations that indicate that she was similarly situated to Mr. Rut at a time when participants were still being added to the plan. So that is our argument with respect to the similarly situated point.

We would also add that the fact Enid Barbel, a woman, was put into the plan, notably undercuts Ms. Wegmann's claim that she was discriminated against on the basis of her female sex and/or gender.

With respect to the points that Mr. Zabell makes --

THE COURT: May I just stop you --

MS. FEDDER: Yes, absolutely.

THE COURT: -- with what you just said.

I'm not disagreeing with the argument that Ms. Barbel's inclusion does seem to complicate the analysis because she is both a woman and non-management level employee.

I guess, what am I to do with the allegation that was recited to me earlier that Mr. Green, this was in paragraph 77, Mr. Green advised plaintiff that she was not treated equivalently to male executives under the plan and indicated that he would attempt to remedy the discriminatory conduct.

I appreciate that what I asked for in my opinion was a

little bit more clarity on the similar situation, but I can't necessarily overlook an allegation that does seem to suggest that someone within YAI believed she was treated improperly because of her gender. What do I do with that?

MS. FEDDER: Well, your Honor, in response, Mr. Green did not have the authority to speak for the plan. The administrator of the plan is the YAI board. There is no indication in the complaint that the YAI board, which is the entity with decision-making power with respect to the plan, uttered any discriminatory words towards the plaintiff.

THE COURT: Could you speak then about the exhaustion point?

MS. FEDDER: Yes, your Honor.

First, Section 5.4A of the plan provides one avenue for claimants to initiate a claim for benefits, and that is to file a claim with the plan administrator.

Ms. Wegmann does not allege that she filed such a claim. At most, she alleges that she made an informal request for benefits, and that is insufficient to establish that she exhausted administrative remedies. The case law is clear on that point. For example, Ms. Wegmann is like a plaintiff that the Southern District of New York found did not exhaust administrative remedies where it did not submit an initial application for benefits.

The case that I am referring to there, your Honor, is

Park v. The Trustees of the 1199 SEIU Health Care Employs Pension Fund. The cite for that case is 418 F. Supp. 2d 343. And the finding that I have referred to is on page 355 of that case.

Also instructive is a case we cited in our letter motion, *Capiello v. NYNEX Pension Plan*, where the court dismissed a benefits claim for lack of exhaustion where the plaintiff merely alleged that she had made a verbal request for review of the benefits denial through her union representative and conceded that she was merely told verbally that her review of benefits denial was not successful. Permitting judicial review of informal benefits requests like Ms. Wegmann's would thwart the purpose of the exhaustion requirement.

The Second Circuit has recognized that exhaustion was intended to, among other things, uphold Congress's desire that ERISA trustees be responsible for their actions, not the federal courts, to minimize costs, to reduce the number of frivolous ERISA lawsuits, to provide a clear administrative record in the event of litigation, to assure that any judicial review is made under the arbitrary and capricious standard and not de novo. None of these purposes can be satisfied here because Ms. Wegmann has failed to exhaust.

With respect to futility, we understand that Ms. Wegmann has pointed the Court to language in the plan document which states, and I quote:

"If the plan fails to follow the claims procedure by this section, a claimant shall be deemed to have exhausted the administrative remedies under the plan."

First, that section addresses administrative exhaustion and not futility. But, second, while Ms. Wegmann does allege that she received no written denial of benefits, she does not sufficiently allege that she ever initiated a claim for benefits in the first place by filing a claim with the plan administrator as is required under the SERP. In other words, as pleaded, her benefits claim provides no basis for the Court to conclude that this plan provision was triggered in the first place.

I would also add that courts in this circuit generally will not apply the futility doctrine where the plaintiff has not submitted an application for benefits under the ERISA plan in the first place. That principle is recognized by the *Park* case that I quoted to you earlier, and there are numerous other cases that recognize that principle as well.

Your Honor, are there any other points that I can address for you?

THE COURT: Not at this exact moment. Let me take a moment, take all of my notes with me and step off the bench.

MR. ZABELL: Your Honor, may I just say very briefly? I have three very small issues.

THE COURT: Yes, but she will still get the last word.

MR. ZABELL: I understand that. First and foremost, with regard to my client's application for benefits directed towards Mr. Green and Mr. Green's statement and counsel saying he is not an individual who is authorized. If you look at page 88 of Mr. Green's affidavit that he submitted in support of his motion, there is an actual amendment to the supplemental pension plan and trust where Eliot Green is listed -- it's not actually signed, although I believe somewhere in here there is a signed copy from Mr. Green where he's listed as the chair and the individual who is responsible for signing off on the plan amendment. That is one.

Number two, her initial claim. Counsel is quick to cite other cases but not the underlying facts regarding them.

THE COURT: I want to stop you for a moment, sir. Because I'm still back with Mr. Green. I'm just noting your allegation complaint is that he is chairman of the board of directors and an individual who held himself out to be a plan administrator. That is your point?

MR. ZABELL: That is correct.

THE COURT: OK. Please proceed to your second point, sir.

MR. ZABELL: The initial claim is guided by the supplemental document which says participant or beneficiary who believes he or she is entitled to any plan benefit under this plan may file a claim with the administrator. There is no

reference to how or in what form that claim is to be filed. That's their plan language. We are not looking outside at anything other than their own language with regard to their application.

And, thirdly, because I promised this would be brief--

THE COURT: Yes.

MR. ZABELL: -- counsel indicated that Mr. Rut was put into the plan in 1995.

THE COURT: 1993?

MR. ZABELL: I heard '95. Can we inquire?

THE COURT: Go ahead.

MS. FEDDER: The board exclusion was added in 1993 and no participants were added to the plan after 1995 due to the changes in the tax laws. Thank you.

MR. ZABELL: If it was 1993, that would mean he was employed for nine years before he was put in the plan. That contradicts the plan language saying that you need to be employed for 15 years. So I believe that that representation contradicts the entire plan document.

THE COURT: OK.

MR. ZABELL: And it's not a matter of putting somebody in the plan. If you look at the plan that was in place in 1993 or 1995, it is still the same plan document that says in order to be eligible, you just need to complete 15 years and be a management level employee. It doesn't even say you need to do

15 years as a management level employee. It just says you need to be there 15 years and be a management level employee. And then it says --

THE COURT: Sir, sir, you said brief.

MR. ZABELL: Thank you.

THE COURT: Thank you. All right.

Ms. Fedder, final, final thoughts.

MR. ZABELL: I apologize. I started this.

MS. FEDDER: No problem. Thank you, your Honor.

Just briefly, the plan document contemplates a written claims procedure.

THE COURT: Where?

MS. FEDDER: Well, it says that the participants -- this is Section 5.4A: Participant or beneficiary who believes that he or she is entitled to any plan benefit may file a claim with the administrator.

I suppose in that particular provision, it doesn't use the term written, but it's difficult to imagine how one would file an unwritten claim.

And later provisions in the plans, for example, one that Ms. Wegmann's counsel has pointed us to, I believe, indicates that if the administrator denies a claim, it must provide to the claimant in writing or by electronic communication, and then it provides or, you know, it enumerates certain things that must be provided in writing.

But, in short, viewing section 5.4 as a whole, it contemplates a written procedure that will result in the compilation of a written administrative record that would then facilitate judicial review or judicial review sought following the completion of the claim procedure.

THE COURT: OK.

MS. FEDDER: Again, we reiterate that the board is the plan administrator, and the board must act as a board. No individual person has the authority to make representations on behalf of the plan. It's the board that is the administrator.

THE COURT: This is in response to the allegations concerning Mr. Green's statements or not?

MS. FEDDER: Yes.

THE COURT: Thank you.

MS. FEDDER: Your Honor, I know Ms. Wegmann's counsel has indicated that or has pointed to the plan document and its eligibility requirements. I would just add that the plan document does not define the term management employee. There is not a definition section that puts that forward.

THE COURT: But I didn't think that was the key to the first thing he was telling me. I thought the 15 years versus nine years was the heart of his issue. Yes?

MS. FEDDER: Yes, your Honor, I do recognize that. My point is that board as plan administrator interprets the plan, and in connection with its interpretation of the plan, the

board's practice has been to identify employees who are eligible for participation in the SERP and to execute board resolutions to put them into the plan. That has been the board's practice. I just offer that for clarification and for the Court's consideration.

THE COURT: OK.

MS. FEDDER: Finally, your Honor, we would ask that if you are inclined to let the discrimination claims go forward, we would ask if we could inquire whether Ms. Wegmann intends to exhaust her administrative remedies under the plan. To the extent her benefit claim is dismissed for lack of exhaustion and she does wish to pursue exhaustion, we would suggest that it may make sense to stay the case, to stay the discrimination claims pending the completion of the administrative review process.

THE COURT: Is there a chance that she is going to be put into this plan?

MS. FEDDER: No, your Honor. My reason for suggesting that is that during the administrative review process a record would be developed which may be helpful to the Court in considering the discrimination claims.

For example, as your Honor knows, the parties disagree about whether Ms. Wegmann was a participant in the plan in the first place. Of course, it is our position that she wasn't, and her position, as we understand it, is that she became

eligible in 2001 and was eliminated from the plan by operation of a discriminatory amendment in 2008.

However, if the Court finds that she was never a participant in the first place, that would render her discrimination claims moot and the Court would not need to expend the judicial resources to reach them.

THE COURT: I'm sorry to cut you off, but this is the thing that confuses me. I thought I just heard you say that depending on the constellation of claims that is left standing after I've decided this issue, I might want to stay the matter while things are resolved. While what is resolved, her ERISA claim?

MS. FEDDER: Yes, your Honor. To the extent you are inclined to dismiss her ERISA claims for lack of exhaustion but to let her discrimination claims go forward, we would suggest that if she intends to exhaust her ERISA claim, the discrimination claims be stayed so that the Court could have the benefit of the administrative record that will be developed when it considers the discrimination claims.

THE COURT: I need to think about this a little bit more, but it sounds like -- and I don't mean this with any malice -- it sounds like you want me to stay so that your client can basically paper the record and explain why she did or did not qualify, and I think that I should be relying on the record that is currently in front of me.

But I think I understand the suggestion you're making, which is: If it turns out she does not qualify for conclusion in the SERP, then that is the alleged discriminatory conduct. And if she doesn't qualify, then there is no discrimination because she fails at the first hurdle because she hasn't even established that there was something that she did not get, or, if you want, we could say she fails at the second hurdle because you would say that the reason why she did not get this benefit is because she did not qualify.

I'm just a little bit perplexed as to why I want to stay these proceedings to let you all figure that out, because I think what she is saying is, you did all figure that out.

MS. FEDDER: Certainly, your Honor, and I understand and appreciate your question.

Our point is simply that in the context of the administrative procedure that is contemplated by the SERP, we at the board would have to respond in writing to Ms. Wegmann's claim. She could then seek review and then, again, we would have to provide a written response. In other words --

THE COURT: I'm sorry, Ms. Fedder. Is not -- she is going to ask, and you're going to say, "No, because there was a change in the tax laws and you, therefore, do not qualify."

And she will say, "OK, I wish to take this, you know, up to wherever I can take this up."

I am just not sure why the procedure you are just now

articulating isn't futile, in the colloquial sense of the term, in the sense that nothing is going to be different when the process ends. But maybe I'm misunderstanding what it is and why it is you want me to stay this litigation.

MS. FEDDER: Certainly, your Honor. Our point with the stay is simply that if Ms. Wegmann intends to use our claims procedure a record would be developed because it must be under the plan, and it seems that that record would be helpful to the court, and would also in some requests be duplicative of the record that would be developed in discovery before this Court.

So, perhaps from a judicial economy sense, it would make sense to stay the case during that procedure, which is an abbreviated procedure which is not intended to take a long time.

THE COURT: I know I want you to have the last word, but I want to be sure you and I aren't speaking about something that is just immaterial to the case.

Mrs. Zabell, do you intend on exhausting the claim or are you just going forward here and assuming that there is no need to present this to the board at YAI.

MR. ZABELL: We believe that we have exhausted our obligations under the plan. If your Honor was to determine that my client made no claim for benefits she still would be timely because she's got six years from the end of her

employment, but I think counsel is missing something that maybe that resides only in my mind.

The discrimination claim has to do with failure to pay comparably for comparable work. Part of that compensation is the benefits awarded under the SERP. That claim would exist regardless of whether or not the SERP was there. It's the compensation that was received from the SERP. So the discrimination claim we believe can stand on its own, doesn't need the SERP.

And I understand your Honor's question with regard to futility. Why stall everything just so we could develop a record and provide further support for why we didn't give you benefits that according to the plan you qualified for.

And with regard to that, counsel's motion to dismiss conceded that Ms. Wegmann did apply for benefits. It's throughout their papers. They treated that as the beginning. They didn't argue in their motion to dismiss that she did not file an application for benefits. They conceded through the complaint that she did, if only for purposes of the motion to dismiss.

THE COURT: My question was so much simpler.

MR. ZABELL: I'm sorry.

THE COURT: Irrespective of how I decide this, if I accept your complaint, are you then going to say, "Thank you, Judge. I'm going to try to now exhaust my remedies with the

plan"?

MR. ZABELL: No.

THE COURT: OK. No matter what I do, you're not going back before the plan. You're taking your chances here in this court, correct?

MR. ZABELL: Correct.

THE COURT: I understand.

OK. Anything else, Ms. Fedder?

MS. FEDDER: Your Honor --

THE COURT: Briefly.

MS. FEDDER: -- briefly. It is an element of her discrimination claim whether or not she was a participant in the plan. She needs to establish that she was a participant in the plan for her discrimination claim to be able to go forward.

THE COURT: I think she may even agree with you on that. I guess her point is that she doesn't think that she needs to go through the exhaustion process. She thinks the plan documents make it clear she was a participant. That's the chance they're taking, but they don't want to press pause here and go to your board and try and figure out whether she qualifies or not. They've made their determination in that regard but I think I understand better as a result of this conversation why you were offering the stay option.

MS. FEDDER: Yes. Well, because it is an ERISA determination whether she was a participant in the plan.

THE COURT: Got it. Anything else?

MS. FEDDER: No, your Honor.

THE COURT: OK. Please be patient for a few moments. I want to step off the bench and see if I can resolve this orally rather than in writing. I'll see what I can do. Thank you.

(Recess)

THE COURT: Let me begin this section by in the manner in which I began the conference by noting this is a little bit unusual in that we've basically had an oral argument for a motion that has not been filed, and that is because I deliberately in the opinion set it up so that, if you will -- and isn't this the motto of Missouri, Show Me -- I wanted plaintiff to show me why these claims should persist.

So, looking at the claims and thinking about the law and thinking about everything that was said today, and recognizing that the arguments Ms. Fedder has made are the best arguments that can be made, I am going to allow the complaint to be filed.

I've heard everything that you've said. I think many of your arguments have a lot of traction a few months from now, but I have thought about futility, and I have thought about -- without you having asked me specifically -- the pleading requirements of 12(b)(6). I think with respect to the discrimination claims, the allegations or the alignment with

Mr. Rut, plus the allegations regarding Mr. Green, which I must take as true, including -- even though it's a little bit conclusory -- the fact that he was an individual who held himself out to be a plan administrator. Maybe discovery will show otherwise, but I've got that.

And on the exhaustion issue, *Davenport* is what it is and these cases are, you know, they are fact dependent, but on these facts, I at least accept what's been alleged here, which is that she was not given the notice she needed to be given, and that effectively, therefore, her claims are deemed to be exhausted because it would not have been worth anything for her to try this.

Ms. Fedder will excuse me for the amount of back-and-forth I had with her on the need to exhaust them now. Mr. Zabell has said to me that is not what he wishes me to do. So, I am accepting this complaint.

I am not going to tell the folks at the back table what to do because they are professionals and they know what to do. You will have a period of 30 days to either answer or move. I can't stop you from making a motion, but we have had a lot of discussion here today, and I think Ms. Fedder has really clued me into all of the arguments and has put forth the best arguments that could be put. I'm not sure it is going to get any better on paper, so I will just let you do with that what you will.

If there is an answer and not a motion, then what I'm likely to do is to file on your behalf a discovery schedule. I don't think this case will take years to do discovery. The one thing I will just tell the parties is, I will give you a fair amount of time, but I'm not going to give you extensions so please don't ask me for them. And if during discovery the parties would rather try and mediate this matter or have any other sort of alternative dispute resolution, I understand it and I can make it happen. We have a Magistrate Judge, Judge Peck. We have mediators aplenty, who are affiliated with the court and who do not charge you for the mediation. I can handle a settlement conference if the parties wish. If the parties want to go through discovery and then talk about further motion practice, I certainly understand that as well.

But for now what I'm going to do is I am going to authorize the filing of the proposed amended complaint that has been provided by plaintiff's counsel, and I will anticipate a response of some sort in 30 days unless that falls on a weekend, then in which case the next business day, and we'll go from there.

Mr. Zabell, anything else today, sir?

MR. ZABELL: Only do I now electronically file the complaint or is it deemed --

THE COURT: I'm going to see if we can't get our people to just have it filed. If not, we'll call you, but I'm

going to talk to our docketing people and see if they will just not accept it. It is on there as an attachment as an exhibit to one of your submissions to me.

MR. ZABELL: Yes.

THE COURT: That should be enough. If not, I'll let you know. I think I can make it happen though.

MR. ZABELL: Thank you.

THE COURT: Ms. Fedder, anything else today?

MS. FEDDER: No, your Honor. I thank you.

THE COURT: Thank you very much.

I'm going to ask the parties, please, to get a transcript of this because some day in another context I may need it. In the ordinary course please. Thank you very much for staying.

(Adjourned)